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MATTERS RELATING TO ARRANGEMENTS FOR THE FINANCIAL MECHANISM

IMPLEMENTATION OF ARTICLE 11 (FINANCIAL MECHANISM). PARAS. 1-4

MODALITIES FOR THE FUNCTIONING OF OPERATIONAL LINKAGES BETWEEN THE CONFERENCE OF THE PARTIES AND THE OPERATING ENTITY OR ENTITIES OF THE FINANCIAL MECHANISM

Elements for inclusion in arrangements between the Conference of the Parties and an operating entity or entities of the financial mechanism

Note by the interim secretariat

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I. INTRODUCTION

A. Committee mandate

1. At its tenth session, the Committee reiterated its previous conclusions regarding modalities for the functioning of operational linkages between the Conference of the Parties (COP) and the operating entity or entities of the financial mechanism (A/AC.237/76, para. 89). In this context, the Committee invited the interim secretariat, in consultation with the secretariat of the Global Environment Facility (GEF), to elaborate, for consideration at its eleventh session, substantive elements that will need to be included in arrangements that are to be drawn up under Article 11.3 of the Convention between the COP and the operating entity or entities of the financial mechanism (A/AC.237/76, para. 90).

B. Scope of the note

2. This note is based upon conclusions reached by the Committee at its eighth, ninth and tenth sessions, and covers the two points encompassed by sub-item 8 (a) (ii) of the provisional agenda, namely:

a. Arrangements for the determination of funding needs;

b. Process for agreeing on arrangements under Article 11.3.

The former point, corresponding to Article 11.3(d), has still not been addressed in substance by the Committee.

3. The Convention provides that the operation of the financial mechanism shall be entrusted to one or more existing international entities and that the COP and the operating entity or entities entrusted with the operation of the financial mechanism shall agree upon arrangements to give effect to Article 11.1 and 11.2. For convenience, this note discusses possible elements of arrangements between the COP and an operating entity (in the singular). It is understood that these elements could be used in individual arrangements with more than one entity.

4. Section II of this note addresses the possible forms of arrangements between the COP and an operating entity and sets out the elements that could be included therein. It is to be noted that the Committee at its tenth session adopted decision 10/3 in which it conveyed to the interim operating entity conclusions reached on temporary arrangements between the Committee and the GEF. That decision contains details of policy guidance from the Committee to the operating entity (A/AC.237/76, annex I, decision 10/3). The elements elaborated in this note contain extracts from that decision, as well as other issues of importance in any arrangement between organizations.

5. Section III briefly addresses the process for agreeing on arrangements, while section IV considers the eventuality that the COP at its first session (COP 1), after reviewing the interim arrangements, would decide to maintain the GEF as an operating entity, whether definitively or on an interim basis (A/AC.237/86, paras. 28-32).

6. This note has been prepared in consultation with the secretariat of the GEF.

C. Possible action by the Committee

7. The Committee may, after considering the elements put forward in this note, recommend to the COP to take these elements into account when agreeing on arrangements with an operating entity of the financial mechanism. The Committee may also wish to make a recommendation to the COP on the form of arrangements.

8. In pursuance of Article 11.3(d), the Committee may also wish to recommend how agreement is to be reached between the COP and an operating entity with regard to the determination in a predictable and identifiable manner of the amount of funding necessary and available for the implementation of the Convention and the conditions under which that amount shall be periodically reviewed.

II. ELEMENTS FOR INCLUSION IN ARRANGEMENTS BETWEEN THE CONFERENCE OF THE PARTIES AND AN OPERATING ENTITY

A. Form of arrangements

9. The form of arrangements to be entered into between the COP and an operating entity is an issue that requires consideration by the Committee when it discusses the elements to be included in the arrangements. The two most common forms used to regulate the relationship between two or more intergovernmental organizations are an "agreement" and a "memorandum of understanding". In a generic sense, the term "agreement" covers a meeting of minds, in this case, the meeting of minds of two or more international persons. In its restricted sense, the term "agreement" means an agreement intended to have an obligatory character.* A memorandum of understanding is another form of arrangement that is increasingly being used to denote an informal, but nevertheless a firm, commitment between two or more States or organizations, particularly when it constitutes a step in resolving a complicated situation.

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*In this context, attention is drawn to the legal opinion provided by the United Nations Office of Legal Affairs in response to the request by the Committee for legal advice on the options for appropriate arrangements which might be entered into between the COP and the GEF (A/AC.237/74).

10. Either of the two forms, that is, either an "agreement" or a "memorandum of understanding", could be used to set out the roles of the COP and an entity responsible for the operation of the financial mechanism of the Convention. Unless it is envisaged that the COP might need to take legal action in case of an infringement of an arrangement, a memorandum of understanding would serve the same purpose as a legally binding agreement and would offer the advantage of being simpler. In case the COP and an operating entity decide to regulate their relationship through a legally binding agreement, the need would arise for the inclusion of a clause on the settlement of disputes.

B. Content of arrangements

11. An arrangement between the COP and an operating entity could include the following elements:

(a) Preamble

(b) Purpose of arrangements

(c) Determination and communication of guidance from the COP

(d) Conformity with COP guidance

(e) Reconsideration of funding decisions

(f) Reports from the operating entity to the COP

(g) Assessment of funding needs

(h) Mobilization of funds

(i) Cooperation between secretariats

(j) Representation in meetings of governing bodies

(k) Review and evaluation of the financial mechanism

(l) Duration of arrangements

12. The elements proposed in this section are drawn from the Convention and initial Committee guidance. In agreeing on arrangements with an operating entity, the relevant provisions of its basic instrument will have to be taken into account.

(a) Preamble

13. The provisions of the Convention that are relevant to arrangements are as follows:

(a) The financial mechanism will provide financial resources on a grant or on a concessional basis, including for the transfer of technology, in accordance with Article 4.3 (Article 11.1);

(b) The financial mechanism is to function under the guidance of and be accountable to the COP, which shall decide on its policies, programme priorities and eligibility criteria related to the Convention (Article 11.1);

(c) The financial mechanism shall have an equitable and balanced representation of all Parties within a transparent system of governance (Article 11.2);

(d) In accordance with Article 11.3, the COP and an operating entity entrusted with the operation of the financial mechanism shall agree upon arrangements to give effect to Article 11.1 and 11.2 (Article 11.3).

(b) Purpose of arrangements

14. The purpose of the arrangements is to give effect to the respective roles and responsibilities of the COP, the supreme body of the Convention, and the operating entity of the financial mechanism and to provide for the required interaction between them under Article 11 (see A/AC.237/76, para. 89 (a)).

(c) Determination and communication of guidance from the COP

15. The COP will, pursuant to Article 11.1, decide on policies, programme priorities and eligibility criteria related to the Convention for the financial mechanism which shall function under the guidance of and be accountable to the COP.

16. In line with Article 11.1, the COP will, after each of its sessions, communicate to the governing body of the operating entity relevant policy guidance for implementation and action by that governing body, which shall accordingly ensure the conformity of the entity's work with the guidance of the COP. Guidance from the COP will address issues relating to policies, programme priorities and eligibility criteria, as well as possible relevant aspects of the activities of the operating entity that are related to the Convention (A/AC.237/76, para. 89 (b)).

17. In addition, the COP may bring to the attention of the operating entity any other matter relevant to the operation of the financial mechanism of the Convention.

(d) Conformity with COP guidance

18. The governing body of the operating entity has the responsibility of ensuring that funded projects related to the Convention are in conformity with the policies, programme priorities and eligibility criteria established by the COP. It will report regularly to the COP on its activities related to the Convention and on the conformity of those activities with the guidance received from the COP (A/AC.237/76, para. 89 (c)).

(e) Reconsideration of funding decisions

19. The funding decisions for specific projects should be agreed between the developing country Party concerned and the operating entity in conformity with policy guidance from the COP. However, if any Party considers that a decision regarding one of the specific projects does not comply with the policies, programme priorities and eligibility criteria established by the COP in the context of the Convention, the COP should analyse the observations presented and take decisions on the basis of compliance with such policies, programme priorities and eligibility criteria. In the event that the COP considers that this specific project decision does not comply with the policies, programme priorities and eligibility criteria established by the COP, it may ask the governing body of the operating entity for further clarification on this specific project decision and in due time ask for a reconsideration of that decision (A/AC.237/76, para. 89 (g)).

(f) Reports from the operating entity to the COP

20. Regular reports by the Chairman or secretariat of the operating entity to its governing body will be made available to the COP through its secretariat. Other official documentation of the operating entity should also be made available to the COP through its secretariat (A/AC.237/76, para. 89 (d)).

21. In addition, the COP should receive and review at each of its sessions a report from the governing body of the operating entity which should include specific information on how it has applied the guidance and decisions of the COP in its work related to the Convention. This report should be of a substantive nature and incorporate the programme of future activities of this entity in the areas covered by the Convention and an analysis on how the entity, in its operations, has implemented the policies, programme priorities and eligibility criteria related to the Convention established by the COP. In particular, a synthesis of the different projects under implementation and a listing of the projects approved in the areas covered by the Convention, as well as a financial report including accounting and evaluation of its activities in the implementation of the Convention, indicating the availability of resources, should be included (A/AC.237/76, para. 89 (e)).

22. In order to meet the requirements of its accountability to the COP, reports submitted by the governing body of the operating entity should cover all its activities carried out in implementing the Convention, whether decisions on such activities are made by the governing body of the operating entity or by bodies operating under its auspices for the implementation of its programme. To this end, it shall make such arrangements with such bodies as might be necessary regarding the disclosure of information (A/AC.237/76, para. 89 (f)).

23. The operating entity may seek guidance from the COP on any matter it considers relevant to the operation of the financial mechanism of the Convention.

(g) Assessment of funding needs

24. The Committee has not provided any guidance on this subject. It may be recalled that the Committee, at its seventh session, requested the Executive Secretary under the guidance of the Bureau, to prepare a preliminary list of elements relevant to the assessment of the needs for funding from the GEF for activities related to the Convention in the three years 1994-1996 for consideration at its next session (A/AC.237/37/Add.4). The Committee, after a preliminary discussion of this document at its eighth session, decided that substantive discussion should be deferred to the ninth session (A/AC.237/41, para. 90). However, the issue was not taken up at either the ninth or the tenth session. Further discussion on the subject by the Committee is needed before conclusions can be reached. The following elements, including those contained in document A/AC.237/37/Add.4, are relevant to the work of the Committee on this matter.

25. The COP, in order to facilitate the determination in a predictable and identifiable manner of the amount of funding necessary and available for the implementation of the Convention, could communicate to the operating entity relevant information, including the following:

(i) Countries or categories of countries eligible for funding under the financial mechanism;

(ii) Types of measures or activities to be funded by the financial mechanism;

(iii) Priority activities to be funded. (It should be noted that the Committee has identified as a priority the funding of agreed full costs (or agreed full incremental costs, as appropriate) incurred by developing country Parties in complying with their obligations under Article 12.1. In this context, enabling activities undertaken by developing countries have also been identified as a priority (A/AC.237/76, para. 82 (a));

(iv) Policy on degree of concessionality of funding for countries or particular categories of countries;

(v) Methodology and modalities for the determination of "agreed full costs" and "agreed full incremental costs".

26. The operating entity would communicate to the COP the amount of funding available to it over a given period.

27. Beyond the elements listed above, the scope for funding measures that are consistent with the commitments of developing country Parties in Article 4.1 is as broad as the range of those commitments. The limiting factors would seem to be the capacities of countries and institutions to design and undertake projects, as well as the availability of funds. In this context it is not easy to put figures on needs.

28. Article 12.4 provides, in part, that "developing country Parties may, on a voluntary basis, propose projects for financing, including specific technologies, materials, equipments, techniques or practices that would be needed to implement such projects". This means that the inflow of communications from developing countries under Article 12 could generate a portfolio of costed project proposals that would be an important -- if not the major -- input to the future determination of strategy, priorities and needs for funding under the Convention. Such communications start to fall due in 1997.

29. Such country-driven elements, together with the operational strategy and operational programmes of the operating entity, would be further elements that could assist in the determination of funding needs for a given period.

30. These issues would need to be addressed by the COP and the operating entity in an iterative process to be defined.

(h) Mobilization of funds

31. Under Article 7.2(h), the COP shall seek to mobilize financial resources in accordance with Article 4.3, 4.4 and 4.5 and Article 11.

(i) Cooperation between secretariats

32. The secretariats of the Convention and of the operating entity shall cooperate and exchange on a regular basis views and experiences necessary for the effective operation of the financial mechanism and the implementation of the Convention.

(j) Representation in meetings of governing bodies

33. The participation of the representatives of an operating entity in meetings of the COP and of its subsidiary bodies will be governed by the rules of procedure of the COP. These are still under discussion. Rule 6, paragraph 1 of the draft rules of procedure contained in document A/AC.237/L.22/Rev.1 states as follows:

> "The United Nations, its specialized agencies, [any international entity entrusted by the Conference of the Parties pursuant to Article 11 of the Convention with the operation of the financial mechanism,] and the International Atomic Energy Agency, as well as any State member thereof or observers thereto not Party to the Convention, may be represented at sessions of the Conference of the Parties as observers."

34. Likewise, the participation of the representatives of the Convention in meetings of the governing body of an operating entity will be determined in accordance with the rules of procedure of that operating entity.

(k) Review and evaluation of the financial mechanism

35. The COP will periodically review and evaluate the effectiveness of all modalities established in accordance with Article 11.3. Such evaluations will be taken into account by the COP in its decision, pursuant to Article 11.4, on arrangements for the financial mechanism (A/AC.237/76, para. 89 (h)).

(l) Duration of arrangements

36. These arrangements will be subject to revision by agreement between the COP and the operating entity within one year after the COP has reviewed the financial mechanism in accordance with Article 11.4.

III. PROCESS FOR AGREEING ON ARRANGEMENTS

37. The COP could request the interim secretariat and later the Convention secretariat to prepare a draft arrangement in collaboration with the secretariat of an operating entity. This could then be considered by a joint working party, including representatives of the COP and of the governing body of the operating entity, as well as their respective secretariats, to finalize the draft arrangements and make recommendations for consideration by the COP and the governing body of the operating entity.

IV. POSSIBLE APPLICATION OF ELEMENTS TO THE GLOBAL ENVIRONMENT FACILITY AS AN OPERATING ENTITY OF THE FINANCIAL MECHANISM

38. Article 21.3 of the Convention entrusts the GEF with the operation of the financial mechanism referred to in Article 11 on an interim basis. The COP, pursuant to Article 11.4 shall make arrangements to implement the provisions of Article 11.1, 11.2 and 11.3 at its first session, reviewing and taking into account the interim arrangements referred to in Article 21.3 and shall decide whether the interim arrangements shall be maintained.

39. With respect to the maintenance of the interim arrangements referred to in Article 21.3, document A/AC.237/86, "Issues to be addressed by the Committee: a preliminary overview", at paragraph 31 suggests that the practical options for recommendation by the Committee to the COP would include:

(a) Entrusting the GEF with the operation of the financial mechanism; or

(b) Continuing to entrust the GEF with the operation of the financial mechanism on an interim basis.

40. In both cases the COP, in accordance with Article 11.4, will within four years after its first session review the financial mechanism and take appropriate measures.

41. If the COP at its first session, after reviewing the interim arrangements, decides to maintain the GEF as an operating entity of the financial mechanism, according to one or other of the options indicated above, the next step will be the determination of the process for reaching agreement with the operating entity, taking account of the suggestion in paragraph 37 above. While elements discussed in section II above address primarily the provisions of the Convention, the relevant provisions of the Instrument for the Establishment of the Restructured Global Environment Facility would also be taken into account in arrangements between the COP and the GEF. The most relevant paragraphs of the Instrument are: paragraphs 6, 20 (g) and (h), 21 (f), 26, 27 and 31 which provide the following:

- "... the GEF shall, on an interim basis, operate the financial mechanism for the implementation of the United Nations Framework Convention on Climate Change ...

... In both respects, [that is, with regard to the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity] the GEF shall function under the guidance of, and be accountable to, the Conference of the Parties which shall decide on policies, programme priorities and eligibility criteria for the purposes of the conventions. The GEF shall also be available to meet the agreed full costs of activities under Article 12, paragraph 1, of the United Nations Framework Convention on Climate Change" (GEF Instrument, para. 6);

- "[The [GEF] Council] shall act as the focal point for the purpose of relations with the Conferences of the Parties to the conventions referred to in paragraph 6, including consideration, approval and review of the arrangements or agreements with such Conferences, receipt of guidance and recommendations from them and compliance with requirements under these arrangements or agreements for reporting to them" (GEF Instrument, para. 20 (g));

- "[The Council shall] in accordance with paragraphs 26 and 27, ensure that GEF-financed activities relating to the conventions referred to in paragraph 6 conform with the policies, programme priorities and eligibility criteria decided by the Conference of the Parties for the purposes of the convention concerned" (GEF Instrument, para. 20 (h));

- "The [GEF] Secretariat shall, on behalf of the Council ... coordinate with the secretariats of other relevant international bodies, in particular the secretariats of the conventions referred to in paragraph 6 ..." (GEF Instrument, para. 21 (f));

- "The Council shall ensure the effective operation of the GEF as a source of funding activities under the Conventions referred to in paragraph 6. The use of the GEF resources for purposes of such Conventions shall be in conformity with the policies, programme priorities and eligibility criteria decided by the Conference of the Parties of each of those conventions" (GEF Instrument, para. 26);

- "The [GEF] Council shall consider and approve cooperative arrangements or agreements with the Conferences of the Parties to the conventions referred to in paragraph 6, including reciprocal arrangements for representation in meetings. Such arrangements or agreements shall be in conformity with the relevant provisions of the convention concerned regarding its financial mechanism and shall include procedures for determining jointly the aggregate GEF funding requirements for the purpose of the convention. With regard to each convention referred to in paragraph 6, until the first meeting of its Conference of the Parties, the Council shall consult the convention's interim body" (GEF Instrument, para. 27);

- "The Council shall approve an annual report on the activities of the GEF. ... The report shall contain all the information necessary to meet the principles of accountability and transparency that shall characterize the Facility as well as the requirements arising from the reporting arrangements agreed with each Conference of the Parties to the conventions referred to in paragraph 6. The report shall be conveyed to each of these Conferences of the Parties ..." (GEF Instrument, para. 31).